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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

Sam Sobh,  
Plaintiff,

No. CV-19-05277-PHX-ROS

## ORDER

Phoenix Graphix Incorporated, et al.,  
Defendants.

Plaintiff Sam Sobh believes he was entitled to a “hardship distribution” from the pension plan he participated in while employed by Defendant Phoenix Graphix Inc. The parties disagree about which version of that plan applied to Sobh’s request for a distribution. According to Sobh, the 2001 version applied and entitled him to a hardship distribution. According to Phoenix Graphix, the 2016 version applied and Sobh was properly denied a hardship distribution. For purposes of Sobh’s claim for benefits under the terms of the plan, Phoenix Graphix is correct. Sobh may, however, be entitled to other remedies under his remaining claims.

## BACKGROUND

The following facts are undisputed. It is simplest to recite the history of the plan before addressing Sobh's circumstances.

#### A. Profit Sharing Plan

In 2001, Phoenix Graphix adopted the “PGI/Phoenix Graphix, Inc. Profit Sharing Plan” (the “Plan”). (Doc. 33-1 at 1). The 2001 Plan allowed Phoenix Graphix to make an

1 “employer contribution” to the Plan which was then allocated to individual employees’  
2 accounts pursuant to a formula. (Doc. 32-1 at 16). As relevant here, the 2001 Plan allowed  
3 for two types of distributions to participants. First, a participant could elect a “cash-out”  
4 distribution. (Doc. 32-1 at 5, 29). A “cash-out” distribution would be made “no later than  
5 the end of the first Plan Year following” a participant’s termination from employment.  
6 (Doc. 32-1 at 5). Second, a participant could “apply in writing to the Administrator for a  
7 hardship withdrawal of part or all of his net distributable amount.” (Doc. 32-1 at 29). The  
8 2001 Plan defined “Participant” as “every Employee or former Employee.” (Doc. 32-1 at  
9 11). Thus, the 2001 Plan allowed for a hardship distribution to a “former Employee.”

10         “The 2001 Plan was restated and amended with an effective date of January 1,  
11 2008.” (Doc. 33-1 at 2). The 2008 Plan made numerous changes but the basic structure  
12 remained the same. That is, the 2008 Plan allowed Phoenix Graphix to make contributions  
13 which were allocated to participants’ accounts. (Doc. 32-1 at 78). The 2008 Plan did,  
14 however, make changes to the hardship distribution provision. In the 2008 Plan, the option  
15 of “hardship withdrawals” was listed under the section titled “Inservice Distribution and  
16 Loans.” (Doc. 32-1 at 101). And the 2008 Plan stated a “Participant” could receive a  
17 hardship withdrawal with “Participant” defined as an individual employed by Phoenix  
18 Graphix. (Doc. 32-1 at 100, 70, 65-66). Thus, the 2008 Plan rendered former employees  
19 ineligible for hardship distributions.

20         Finally, “[i]n March 2016, the 2008 Plan was restated and amended with an effective  
21 date of January 1, 2016.” (Doc. 33-1 at 2). The 2016 Plan consisted of an “Adoption  
22 Agreement” containing check-the-box options and a “Basic Plan Document” containing  
23 the substantive provisions. The “Adoption Agreement” stated “hardship withdrawals”  
24 were allowed but they were listed under a section titled “In-Service Withdrawals.” (Doc.  
25 32-1 at 183-84). Similarly, the Basic Plan Document listed “hardship withdrawals” under  
26 the section titled “In-Service Distributions and Loans.” (Doc. 32-1 at 251). The relevant  
27 provision stated “[a] Participant may receive a distribution on account of hardship.” (Doc.  
28 32-1 at 251). “Participant” was defined as “an Eligible Employee who participates in the

1 Plan.” (Doc. 32-1 at 206). And “Eligible Employee” was defined as “any Employee  
 2 employed by the Company.” (Doc. 32-1 at 203).

3 In light of the hardship distribution provision being listed under “In-Service  
 4 Distributions” and the applicable definitions, the 2016 Plan appears to not allow hardship  
 5 distributions to former employees. However, the 2016 Plan did allow for an individual to  
 6 receive a distribution of his account balance upon his “Termination of Employment,” a  
 7 term that was defined as “any absence from service that ends the employment of the  
 8 Employee with the Employer.” (Doc. 32-1 at 240, 210). Thus, a former employee *could*  
 9 receive his account balance, he just could not have that distribution labeled a “hardship  
 10 distribution.”<sup>1</sup>

11 There was a Summary Plan Description (“SPD”) prepared in connection with the  
 12 2016 Plan. (Doc. 32-1 at 137). The SPD explained an individual was “entitled to receive  
 13 a distribution from your Account after you terminate employment.” (Doc. 32-1 at 145).  
 14 In a section titled “In-Service Distributions and Loans,” the SPD explained an individual  
 15 “may receive a distribution on account of hardship.” (Doc. 32-1 at 146). And the SPD  
 16 also stated “Only Employees are eligible to receive in-service distributions.” (Doc. 32-1  
 17 at 147). Thus, the SPD indicated former employees were not eligible for hardship  
 18 distributions.

19 **B. Sobh’s Employment and Requests for Distribution**

20 In approximately 2009, Sobh began working for Phoenix Graphix. At some point  
 21 prior to 2016, Sobh began participating in the Plan. On March 28, 2016, the President of  
 22 Phoenix Graphix, Brian Kotarski, sent an email to Sobh and other employees. The subject  
 23 of that email was “Profit Sharing Plan” and the email stated the employees had already  
 24 received the Plan’s Annual Notice, a Beneficiary Designation Form, and a Wage Deferral  
 25 Agreement Form. The email instructed the employees to fill out and return the Beneficiary

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26  
 27 <sup>1</sup> As explained by Phoenix Graphix, identifying a distribution as a “hardship distribution”  
 28 may allow a participant to avoid a 10% tax penalty. (Doc. 33 at 10). Given Sobh’s account  
 balance of approximately \$35,000, his insistence on taking a hardship distribution instead  
 of a non-hardship distribution means he is seeking to avoid, at most, an additional tax  
 liability of approximately \$3,500.

1 Designation Form. Sobh responded to that email with a series of questions such as “Are  
 2 we withdrawing the money from the current plan and starting a new elective deferrals  
 3 program under a new plan?” (Doc. 32-1 at 280). Sobh also requested a “copy of the SPD.”  
 4 From the content of Sobh’s email it is clear he knew changes were being made to the Plan  
 5 as of 2016.

6 In approximately July 2018, Sobh stopped working for Phoenix Graphix. The  
 7 parties do not provide the circumstances of Sobh’s departure, but it appears he left on bad  
 8 terms. (Doc. 29-2, 28-12 at 3). On August 14, 2018, Sobh sent an email to Kotarski. That  
 9 email stated, in relevant part:

10 I’m sending you this email to officially request a release of my  
 11 Profit Sharing vestings. I’m going thru financial hardship;  
 12 Therefore, I need to exit out of the plan and transfer the vesting  
 to my personal bank account.

13 (Doc. 32-1 at 282) (all errors in original). Sobh sent a similar email a few hours later.  
 14 (Doc. 32-1 at 283). Kotarski responded to those emails the next day, stating:

15 The “plan” is very “legal” and no exceptions can be made. The Plan states;

16 **Time & Form of Payment**

17 **3. Time of Payment (Other than Death)**

18 Distributions after Termination of Employment for reasons other than death shall commence (Section 7.02):

- 19 a. [ ] Immediate. As soon as administratively feasible with a final payment made consisting of any allocations occurring after such  
 Termination of Employment
- b. [ X ] End of Plan Year. As soon as administratively feasible after all contributions have been allocated relating to the Plan Year in  
 which the Participant’s Account balance becomes distributable
- c. [ ] Normal Retirement Date.
- d. [ ] Other: \_\_\_\_\_

20  
 21  
 22  
 23 The Profit Sharing plan administration for any given/calendar year is completed the following March/April (2019; in this case).  
 Distribution will be made in accordance with your direction at that time.

24 (Doc. 32-1 at 284). The “Time & Form of Payment” portion of that email was from the  
 25 “Adoption Agreement” for the 2016 Plan. That portion of the Adoption Agreement bears  
 26 no resemblance to any provision of the 2001 Plan. Around the time Sobh and Kotarski  
 27 were exchanging emails, Sobh obtained counsel. That counsel began corresponding with  
 28 counsel for Phoenix Graphix. Sobh also continued directly emailing Kotarski.

1 On September 17, 2018, Sobh emailed Kotarski again, stating:

2 This is my forth and last official request to pull my investment  
 3 money/share from the profit sharing plan.

4 I'm living in a sever financial hardship and I need to receive  
 my money to pay bills.

5 (Doc. 32-1 at 286) (all errors in original). A few days later, Sobh's counsel emailed  
 6 Phoenix Graphix's counsel to explain "Sobh has requested . . . a hardship withdrawal from  
 7 the Plan." (Doc. 32-1 at 288). Sobh's counsel then cited provisions of the 2001 Plan that  
 8 governed the circumstances under which a hardship distribution was permissible. Phoenix  
 9 Graphix's counsel responded "[t]he actuary for the Plan advises that Mr. Sobh does not  
 10 qualify for the hardship distribution because that applies to participants who are actively  
 11 employed." (Doc. 28-6 at 2).

12 **C. Sobh's First Litigation**

13 On November 14, 2018, Sobh filed his first suit against Phoenix Graphix. (Doc. 1  
 14 in CV-18-4073). That suit alleged Sobh had "requested that his benefits under the [Phoenix  
 15 Graphix] Plan be cashed out" but the "request was denied." Based on that denial, Sobh  
 16 alleged a claim for "Improper Denial of Plan Benefits - ERISA § 502(a)(1)(B)." The  
 17 complaint alleged other claims under ERISA as well as a state-law claim for unpaid wages.  
 18

19 On January 30, 2019, Phoenix Graphix's counsel sent a letter to Sobh's counsel  
 20 regarding the complaint. That letter explained Sobh's cause of action seeking a "cash-out"  
 21 distribution was barred by the applicable plan documents. The letter referenced and  
 22 attached the 2001 Plan and the 2016 SPD. (Doc. 28-7 at 2). Relying on the 2001 Plan, the  
 23 letter explained Sobh was entitled to a "cash-out" distribution but that distribution would  
 24 not be paid until "March or April of this year (2019)." (Doc. 28-7 at 3). In other words,  
 25 Phoenix Graphix's counsel interpreted Sobh's claim for "benefits" under the Plan as a  
 26 request that he receive a "cash-out" distribution, not that Sobh receive a hardship  
 27 distribution.

28 On February 15, 2019, Phoenix Graphix's counsel sent another letter to Sobh's  
 counsel. That letter included all the documents necessary for Sobh to receive a "cash-out"

1 distribution. If executed, those documents would have allowed Sobh to receive all the  
2 funds in his account. Thus, the letter argued Sobh's pending claim for benefits in the  
3 lawsuit was "moot." (Doc. 28-8 at 3). Sobh disagreed and did not withdraw his claim. On  
4 February 19, 2019, Phoenix Graphix filed a motion to dismiss.

5 In seeking dismissal of Sobh's claim for unpaid benefits, the motion to dismiss  
6 argued "the applicable plan documents barred Mr. Sobh from cashing out his benefits  
7 before the end of 2018." (Doc. 12 in CV-18-4073). In support, the motion cited to the  
8 "Master Plan Document" of the 2001 Plan. The motion also cited to the 2016 SPD.  
9 According to the motion to dismiss, those documents explained a terminated employee was  
10 entitled to receive his balance from the Plan "as soon as administratively feasible in the  
11 Plan Year following the Plan Year of termination of employment." (Doc. 12 at 3 in CV-  
12 18-4073). As had counsel's correspondence with Sobh, the motion to dismiss continued  
13 to interpret Sobh's request for benefits as a request for a "cash-out" distribution, *i.e.* not a  
14 hardship distribution.

15 In his opposition to the motion to dismiss, Sobh explained he was seeking a hardship  
16 distribution. (Doc. 15 in CV-18-4073). Sobh cited the 2001 Plan as authorizing a hardship  
17 distribution, even to a former employee. The reply then pointed out the 2001 Plan  
18 differentiated between a "cash-out" and a "hardship distribution." The reply argued the  
19 complaint had asserted a claim seeking a "cash-out" distribution, not a "hardship  
20 distribution."

21 On August 22, 2019, District Judge Lanza granted the motion to dismiss. In doing  
22 so, Judge Lanza cited extensively to the 2001 Plan and explained the allegations in the  
23 complaint were that Sobh was seeking a "cash-out" not a "hardship distribution." Because  
24 the complaint itself had not sought a "hardship distribution," the claim for benefits was  
25 dismissed. The other claims were also dismissed. Sobh was granted leave to file an  
26 amended complaint by September 13, 2019, but he did not do so. Thus, a judgment of  
27 dismissal without prejudice was entered.

28

1                   **D. Second Litigation**

2                   On September 9, 2019, shortly before his first case was dismissed, Sobh sent an  
 3 email to Kotarski again requesting he be allowed “to withdraw [his] funds under the  
 4 Hardship withdrawal term.” (Doc. 28-12 at 8) (capitalization in original). Sobh’s counsel  
 5 then sent a copy of that email to Phoenix Graphix’s counsel. Sobh’s counsel explained  
 6 Sobh had “made it clear . . . that he would like to request the distribution as a hardship.”  
 7 (Doc. 28-12 at 7). On September 13, 2019, Sobh’s counsel sent another email to Phoenix  
 8 Graphix’s counsel stating Sobh was “adamant in his request for a hardship distribution.”  
 9 (Doc. 28-12 at 5). Sobh’s counsel explained it was “really an issue of . . . tax liability.”  
 10 (Doc. 28-12 at 5). The attorneys continued to exchange emails for the next few days. On  
 11 September 17, 2019, Sobh’s counsel sent an email to Phoenix Graphix’s counsel stating  
 12 “we have the Master Plan Document . . . that is apparently from 2001, and the summary  
 13 plan document from 2016.” Sobh’s counsel asked for “the current master plan document.”  
 14 (Doc. 28-12 at 3). That same day, Sobh emailed Kotarski asking for, among other things,  
 15 “Plan Documents” and “Plan Trust Documents.” (Doc. 28-10 at 2).

16                  On September 18, 2019, Phoenix Graphix’s counsel emailed Sobh’s counsel saying  
 17 “Attached is what I understand is the current master plan document.” Strangely, the  
 18 attached document was the 2001 Plan. (Doc. 28-12 at 2). On September 26, 2019, Sobh  
 19 filed the present suit. Sobh attached a copy of the 2001 Plan and alleged he was entitled to  
 20 a hardship distribution under its terms. (Doc. 1 at 3). Phoenix Graphix moved to dismiss,  
 21 arguing the complaint did not allege facts establishing Sobh was suffering a qualifying  
 22 “hardship.” To be precise, Phoenix Graphix argued Sobh was not entitled to a hardship  
 23 distribution under the terms of the 2001 Plan. Phoenix Graphix did not argue Sobh’s claim  
 24 was based on an outdated version of the Plan. Before the Court could rule on the motion  
 25 to dismiss, Sobh filed an amended complaint. (Doc. 13). The amended complaint, filed  
 26 on November 8, 2019, again relied on the 2001 Plan. The amended complaint included  
 27 allegations regarding Sobh’s financial difficulties and alleged he was entitled to a hardship  
 28 distribution pursuant to the terms of the 2001 Plan.

1           On November 18, 2019, Phoenix Graphix’s counsel sent a letter to Sobh’s counsel.  
 2 That letter explained the 2001 Plan was no longer in effect as it had been restated in 2016.  
 3 (The letter did not reference the 2008 Plan.) Phoenix Graphix then claimed the terms of  
 4 the 2016 Plan were that former employees were not entitled to hardship distributions.  
 5 Thus, the letter argued Sobh’s pending claim for a hardship distribution was “not viable as  
 6 a matter of law.” (Doc. 28-13 at 3). This letter appears to have been the first time Sobh  
 7 was explicitly informed the 2001 Plan had been replaced by the 2016 Plan. That letter did  
 8 not change the parties’ positions and, on December 17, 2019, Sobh filed a second amended  
 9 complaint. (Doc. 20).

10           Sobh’s second amended complaint alleges five claims:

- 11           1. Improper denial of plan benefits under ERISA § 502(a)(1)(B);  
 12           2. Declaratory Relief;  
 13           3. Breach of fiduciary duty under ERISA § 502(a);  
 14           4. Violation of ERISA § 502(c) for not providing documents in timely manner; and  
 15           5. Improperly retained wages under A.R.S. § 23-350.

16           The first cause of action for plan benefits is still premised on the 2001 Plan because,  
 17 according to Sobh, that was the version “cited to [Sobh] and produced by [Phoenix  
 18 Graphix] at the time of the requests for the distribution.” (Doc. 20 at 12). In its answer to  
 19 the complaint, Phoenix Graphix denied the 2001 Plan governed and alleged the 2016 Plan  
 20 was the applicable version. (Doc. 21). The Court held a scheduling conference and set a  
 21 briefing schedule solely on the first claim seeking benefits under the Plan.

22           On April 1, 2020, Sobh filed a motion for summary judgment as well as a “Motion  
 23 for Determination of the Administration Record.” The latter motion argues the decision to  
 24 deny Sobh a hardship distribution must have been made under the 2001 Plan because that  
 25 was the version repeatedly referenced by the parties in emails and briefs during the  
 26 previous lawsuit. Sobh requests the Court “remove[] from the Administrative Record” all  
 27 documents indicating something other than the 2001 Plan applies. (Doc. 28 at 10). As for  
 28 Sobh’s motion for summary judgment, that motion presents arguments under the terms of

1 the 2001 Plan.

2 Phoenix Graphix opposes the motion to remove documents from the administrative  
 3 record and its own motion for summary judgment argues that, under the terms of the 2016  
 4 Plan, Sobh was properly denied a hardship distribution. (Doc. 33). Therefore, Phoenix  
 5 Graphix argues it is entitled to summary judgment on Sobh's claim for benefits. All of the  
 6 parties' motions are now fully briefed.

## 7 ANALYSIS

8 The parties' present disputes boil down to a single question: which version of the  
 9 Plan should apply to Sobh's claim for benefits pursuant under ERISA § 502(a)(1)(B)?  
 10 Sobh believes the 2001 Plan should apply while Phoenix Graphix believes the 2016 Plan  
 11 should apply. While the present circumstances are unusual, the 2016 Plan applies.

### 12 I. Sobh's Claim Pursuant to ERISA § 502(a)(1)(B)

13 According to Phoenix Graphix, the 2016 Plan must apply because Sobh "had no  
 14 vested rights in the 2001 Plan" and "employers are free under ERISA, for any reason, at  
 15 any time, to adopt, modify, or terminate welfare plans." (Doc. 33 at 6). In support of these  
 16 arguments Phoenix Graphix cites Ninth Circuit authority stating the version of a *welfare*  
 17 plan in effect when benefits are denied applies to a lawsuit seeking benefits. (Doc. 33 at  
 18 6) (citing *Grosz-Salomon v. Paul Revere Life Ins. Co.*, 237 F.3d 1154, 1160 (9th Cir. 2001)).  
 19 The Plan, however, is not a welfare plan, it is a pension plan. *See Peralta v. Hispanic Bus., Inc.*, 419 F.3d 1064, 1069 n.5 (9th Cir. 2005) ("ERISA governs two types of employee  
 20 benefit plans: (1) 'pension' benefit plans and (2) 'welfare' benefit plans."). And there are  
 21 substantial differences between the two types of plans. Of relevance for this case, ERISA  
 22 dictates that benefits under a pension plan *do* vest. Benefits under a welfare benefit plan  
 23 "need never vest." *Grosz-Salomon v. Paul Revere Life Ins. Co.*, 237 F.3d 1154, 1160 (9th  
 24 Cir. 2001). A situation involving a claim for vested benefits, such as benefits under a  
 25 pension plan, may require application of a version of a plan no longer in effect. A case  
 26 cited by Phoenix Graphix establishes this point, even in the context of a welfare benefit  
 27 plan.

1       In *Shane v. Albertson's Inc.*, 504 F.3d 1166, 1168 (9th Cir. 2007), an employee  
2 participated in her employer's disability plan. In 2000, the employee became disabled and  
3 began receiving disability benefits. At that time, the governing plan was the "1993  
4 Disability Plan." That plan provided "[a]ny amendment to the Plan shall be effective only  
5 with respect to Total Disabilities which commence on and after the effective date of the  
6 amendment." *Id.* In February 2002, the employer amended the disability plan. The 2002  
7 Plan, however, stated "Total Disabilities commencing prior to the effective date of a Plan  
8 amendment are to be provided for under the terms of the Plan in effect at the time those  
9 disabilities commenced." *Id.* at 1169. In April 2003, the employer terminated the  
10 employee's benefits. *Id.* at 1168. When the employee sought continued payment of  
11 benefits, the parties disagreed whether the 1993 or 2002 version of the plan should apply  
12 to the employee's claim.

13       The Ninth Circuit held the claim for benefits had to be decided under the terms of  
14 the 1993 Plan. In reaching this conclusion, the panel explained a previous Ninth Circuit  
15 case had held a claim for benefits should be decided pursuant to the welfare plan in effect  
16 at the time the benefits were denied. But the panel stated that earlier case was premised on  
17 the employee's rights not being vested. *Id.* at 1169. Based on the language in the 1993  
18 Plan and the 2002 Plan, the employee's rights had vested under the 1993 Plan. Therefore,  
19 the 1993 Plan had to be used when resolving the employee's later claim for benefits. *See*  
20 *Dallenbach v. Standard Ins. Co.*, No. 218CV02024GMNVCF, 2020 WL 1430036, at \*4  
21 (D. Nev. Mar. 24, 2020) (reading *Shane* as holding the employee's benefits vested under  
22 the 1993 Plan).

23       Under the reasoning of *Shane*, when benefits vest under a particular version of an  
24 ERISA plan, that version may apply to a subsequent claim for benefits. While *Shane* dealt  
25 with vested benefits under a welfare plan, the same result applies to a pension plan. In  
26 other words, an employee who accrues benefits under an ERISA-covered pension plan  
27 does not lose those benefits if his employer happens to change the plan's terms. Instead,  
28 regardless of subsequent amendments, a claim for pension benefits might have to be

1 resolved under the terms of an earlier plan.

2 Pursuant to ERISA, Sobh had vested rights under the Plan as soon as he made  
 3 contributions to it or as soon as he met the vesting schedule for Phoenix Graphix's  
 4 contributions on his behalf. *See 29 U.S.C. § 1053(a)(1)* (requiring "employee's rights in  
 5 his accrued benefit derived from his own contributions are nonforfeitable" and requiring  
 6 vesting schedule for "employee's accrued benefit derived from employer contributions").  
 7 Based on the parties' submissions, Sobh started working for Phoenix Graphix after the  
 8 2008 Plan went into effect. Accordingly, Sobh never accrued any benefits under the 2001  
 9 Plan. Sobh might be entitled to benefits under the 2008 Plan but he appears uninterested  
 10 in that, perhaps because the 2008 Plan appears to forbid hardship distributions to former  
 11 employees.

12 Instead of arguing the 2001 Plan was in effect during his employment, Sobh argues  
 13 the 2001 Plan must apply because of Phoenix Graphix's behavior in repeatedly providing  
 14 and citing the 2001 Plan in interactions with Sobh. As an initial matter, it is not accurate  
 15 that Phoenix Graphix cited only the 2001 Plan to Sobh after he requested a distribution. In  
 16 an email Kotarski sent to Sobh on August 15, 2018, Kotarski quoted from the Adoption  
 17 Agreement for the 2016 Plan. Because the portions Kotarski quoted bear no resemblance  
 18 to the 2001 Plan, Sobh likely either knew or should have known of the 2016 Plan at that  
 19 time.<sup>2</sup> Given the August 2018 email, it is unclear why Sobh initially came to believe the  
 20 2001 Plan should apply.

21 It is true that Phoenix Graphix introduced some confusion by repeatedly citing and  
 22 relying on the 2001 Plan before and during Sobh's first litigation. Sobh cites that behavior  
 23 in his request that the Court use the 2001 Plan when resolving his claim for benefits. While  
 24 not labeled as such, Sobh is effectively making an equitable estoppel claim. An equitable  
 25 estoppel claim, however, is made pursuant to ERISA § 502(a)(3). *See Gabriel v. Alaska*  
*Elec. Pension Fund*, 773 F.3d 945, 955-56 (9th Cir. 2014) (outlining elements for equitable

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27 <sup>2</sup> Moreover, Sobh likely received a copy of the SPD for the 2016 Plan long before he made  
 28 any request for a distribution. And that SPD places hardship distributions under a section  
 labeled "In-Service Distributions and Loans" and states "Only Employees are eligible to  
 receive in-service distributions." (Doc. 32-1 at 147). (Doc. 32-1 at 146).

1 estoppel in ERISA context). Equitable estoppel is not available for purposes of Sobh's  
 2 claim pursuant to ERISA § 502(a)(1)(B). *See CIGNA Corp. v. Amara*, 563 U.S. 421, 436  
 3 (2011) (holding ERISA § 502(a)(1)(B) "speaks of *enforc[ing]* the terms of the plan, not of  
 4 *changing* them") (emphasis in original). Therefore, Sobh's assertion that misleading  
 5 behavior by Phoenix Graphix mandates application of the 2001 Plan for purposes of his  
 6 ERISA § 502(a)(1)(B) claim is not convincing.

7 Because the ERISA § 502(a)(1)(B) claim must be resolved under the terms of the  
 8 2016 Plan the question is whether the 2016 Plan allowed for a hardship distribution to a  
 9 former employee. Before resolving that question, the Court must determine the appropriate  
 10 standard of review to apply to Phoenix Graphix's decision that the 2016 Plan did not allow  
 11 for such distributions.

12 The 2016 Plan contained a discretionary clause granting Phoenix Graphix  
 13 "complete discretionary power and authority . . . to construe and interpret the provisions  
 14 of the Plan." (Doc. 32-1 at 270). But "[e]ven when a plan confers discretion on an  
 15 administrator, if that administrator engages in wholesale and flagrant violations of the  
 16 procedural requirements of ERISA, its decision is subject to de novo review." *Pac. Shores*  
 17 *Hosp. v. United Behavioral Health*, 764 F.3d 1030, 1040 (9th Cir. 2014). The manner in  
 18 which Sobh's various claims were handled qualifies under this exception.

19 Pursuant to the 2016 Plan, any claim denial should have included

20 (1) the reason or reasons for such denial, (2) the pertinent Plan  
 21 provisions on which the denial is based, (3) any material or  
 22 information needed to grant the claim and an explanation of  
 23 why the additional information is necessary, and (4) an  
 24 explanation of the steps that the Claimant must take if he  
 25 wishes to appeal the denial including a statement that the  
 26 Claimant may bring a civil action under ERISA.

27 (Doc. 32-1 at 272). There is no evidence Phoenix Graphix complied with these  
 28 requirements in denying Sobh's claims.<sup>3</sup> Moreover, it is not even clear Phoenix Graphix

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27 <sup>3</sup> Phoenix Graphix argues Sobh's claim for benefits is barred by the statute of limitations.  
 28 However, a claim for benefits "accrues either at the time benefits are actually denied, or  
 when the insured has reason to know that the claim has been denied." *Withrow v. Halsey*,

1 was the entity who resolved Sobh's claims for benefits. At one point, Phoenix Graphix's  
 2 counsel explained Sobh was not entitled to a hardship distribution because the "plan  
 3 actuary" stated Sobh was not eligible. (Doc. 28-6 at 2). Phoenix Graphix, not the "plan  
 4 actuary," should have been making that decision. Accordingly, for purposes of resolving  
 5 the present motions, the Court concludes Phoenix Graphix's behavior during the  
 6 administrative claim process requires application of the de novo standard of review.

7 Under a de novo review, the language of the 2016 Plan establishes Sobh was not  
 8 entitled to a hardship distribution. The 2016 Plan listed "hardship withdrawals" under the  
 9 section titled "In-Service Distributions and Loans." (Doc. 32-1 at 251). The 2016 Plan  
 10 also stated "[a] Participant may receive a distribution on account of hardship" with  
 11 "Participant" defined as an individual "employed by the Company." (Doc. 32-1 at 251,  
 12 203). There is no ambiguity in these provisions. At the time he requested a distribution,  
 13 Sobh was not "employed" by Phoenix Graphix. Therefore, he was not eligible for a  
 14 hardship distribution. Phoenix Graphix is entitled to summary judgment on Sobh's claim  
 15 pursuant to ERISA § 502(a)(1)(B).

## 16 **II. Additional Proceedings**

17 Having resolved Sobh's claim for benefits, there are four remaining claims:  
 18 declaratory relief; breach of fiduciary duty under ERISA § 502(a); violation of ERISA §  
 19 502(c) for not providing documents in timely manner; and improperly retained wages  
 20 under A.R.S. § 23-350. The request for declaratory relief appears to be duplicative of the  
 21 claim for benefits. The claim sought "declaratory relief confirming [Sobh's] rights under  
 22 the PGI Plan." Given that Sobh is not entitled to benefits under the terms of the 2016 Plan,  
 23 the declaratory relief claim also fails.

24 As for the three other claims, it is unclear how the parties wish to proceed. The  
 25 parties will be required to confer and submit a joint statement. If either party believes  
 26 discovery is appropriate, they shall submit a proposed discovery schedule.

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27 655 F.3d 1032, 1036 (9th Cir. 2011). Given the manner in which Sobh's administrative  
 28 claims were handled, in particular the failure to provide him a copy of the 2016 Plan and  
 the failure to outline his appeal rights, it was not clear when his claim had been "finally  
 denied." *Id.* Thus, for present purposes, the Court will treat the claim for benefits as timely.

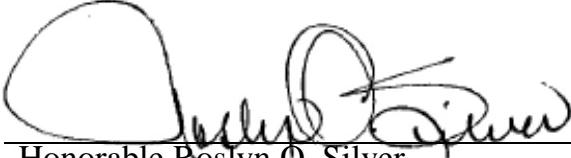
1           Accordingly,

2           **IT IS ORDERED** the Motion for Determination of the Administrative Record  
3 (Doc. 28) and Motion for Summary Judgment (Doc. 29) are **DENIED**.

4           **IT IS FURTHER ORDERED** the Motion for Summary Judgment (Doc. 33) is  
5 **GRANTED** on the claim pursuant to 29 U.S.C. § 1132(a)(1)(B) and the claim for  
6 declaratory relief.

7           **IT IS FURTHER ORDERED** no later than **December 16, 2020**, the parties shall  
8 confer and file a status report.

9           Dated this 8th day of December, 2020.

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13           Honorable Roslyn O. Silver  
14           Senior United States District Judge

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